

Testimony of Chairman Kyle Prior
on behalf of the
Shoshone-Paiute Tribes of the Duck Valley Reservation

Madam Chairwoman and members of the House Natural Resources Subcommittee on Water and Power, thank you for holding this hearing and inviting me to present testimony on this very important issue, the settlement of our water rights claims.

I am honored to be here to represent the Shoshone-Paiute people and to witness the culmination of many decades of hard work and persistence by the tribal leaders who came before me to finally fulfill the vision of our forefathers: the creation of a sustainable homeland for our people.

Duck Valley: A Sustainable Homeland

The Duck Valley Reservation is the homeland of the Shoshone-Paiute Tribes. It was established for the Tribes' use and benefit by Executive Order in 1877 pursuant to the 1863 Treaty of Ruby Valley. Lands were added by Executive Orders in 1886 and 1910, so that today, the Reservation encompasses 290,000 acres located within the States of Nevada and Idaho. The Duck Valley Reservation is unallotted and the entire Reservation is held in trust for the Tribes.

In 1877, when our forefathers first agreed to be settled on the Duck Valley Reservation (the "Reservation"), they were promised a homeland that had plentiful wildlife and game, productive agricultural and range lands, and an excellent fishery abundant with salmon and steelhead trout. Located in Northeast Nevada and Southwest Idaho, our reservation has three primary water sources: (i) the East Fork of the Owyhee River which flows south to north through the Reservation, (ii) Blue Creek, which is a tributary to the Owyhee River in the Idaho portion of the Reservation, and (iii) Mary's Creek, which is part of the Bruneau River Basin in Idaho. These water sources were intended to supply water for tribal uses, including irrigated agriculture, stock raising, fisheries, wildlife and domestic use. Thus far, the promise of a homeland has not been fully realized.

Our people have a long history of being agriculturists. Even before the Reservation was established, many of our people successfully engaged in agriculture beginning in 1875 at Carlin Farms, an area nearby reserved by Executive Order for this purpose. Despite their farming success, our people were forced to abandon their improvements when the Executive Order reserving Carlin Farms was withdrawn due to pressure from non-Indian settlers in the area.¹

When the present Reservation was established in 1877 and settled by our people, agriculture remained a focus. However, by 1890, it became apparent to the Tribes and the Federal Government that flows from the Owyhee River, Blue Creek and Mary's Creek

¹ JRP Historical Consulting, *Duck Valley Indian Reservation: Creation, Purposes and Water Development* (hereafter JRP Report) July 1, 2005, at II-17-18.

were seasonal, and facilities to store water would be necessary to realize the full potential for irrigated agriculture on our lands. For the next 40 years, our tribal leaders and officials from the Bureau of Indian Affairs tried unsuccessfully to obtain a water storage facility to support irrigation on our reservation.

Our struggles during this time were complicated by several factors including rapidly increasing non-Indian settlement in the areas surrounding our reservation; over-appropriation of Blue Creek upstream of the Reservation in Idaho; ever increasing use of water by non-Indians south of the Reservation in Nevada; and Bureau of Reclamation opposition to the construction of a water storage facility on the Reservation. Bureau of Reclamation opposition was based on its conflicting concern that construction of the Wild Horse Dam and Reservoir would compromise the future of the Owyhee Project, a Bureau of Reclamation project, which served downstream non-Indian water users in Oregon and Idaho.

Throughout the struggle to obtain sufficient storage water to support agriculture on the Reservation, the need to take steps to establish and protect the Tribes' water rights was identified over and over. Yet, despite our urging, no steps were taken by the Federal Government to protect this vital resource. Even though specific requests were made to the Justice Department on at least two occasions, and even though a detailed complaint was prepared by the Justice Department in connection with the Tribes' rights in the Owyhee River, the Federal Government never followed through to establish and protect the Tribes' water rights. In the meantime, ever increasing use of water both to the north and to the south of the Reservation continued.

Duck Valley Irrigation Project/Wild Horse Reservoir

Ultimately, our leaders were successful in establishing a formal Indian irrigation project in 1938, including critical storage for the project. Funding was first authorized by Congress for Wild Horse Dam and Reservoir in 1931, and construction was completed by 1938 to finally provide stored water to serve the Reservation. Even with the construction of the Wild Horse Dam, however, the water resources of our Tribes were sacrificed for the benefit of non-Indian water users. The Wild Horse Dam and Reservoir were located nearly 15 miles south of the Reservation in a location that permitted 60% of the drainage flows from the Owyhee River to bypass the Wild Horse Dam and flow downstream to serve the Owyhee Project and meet other off-reservation needs. The resulting loss of water has limited the number of acres of agriculture the Tribes can cultivate to 12,800 acres rather than up to 24,000-30,000 acres if the Wild Horse Dam was properly placed.²

² The Bureau of Reclamation actively opposed the authorization and construction of the Wild Horse Reservoir because of concerns it would interfere with its own Owyhee Project water supply, causing significant delays in construction of storage for the Duck Valley Project. JRP Report at VII-29-41. The Bureau of Reclamation also actively opposed an adjudication of Duck Valley water rights that was proposed in the 1930's for similar reasons.

The Bureau of Reclamation's Owyhee Project downstream in Oregon and Idaho, was planned, authorized and constructed during the same time period, and Reclamation treated the Tribes' Project as competition for Owyhee water. Rather than protecting the prior and paramount rights of the Tribes, however, the Federal Government acted to protect flows from the Owyhee River for the benefit of non-Indian water users.

Just as devastating to our people was the destruction of Tribal fisheries caused by the Owyhee Project. The Project Dam was constructed without fish ladders or other devices to protect anadromous fish runs of salmon and steelhead to the Reservation. What was once an abundant resource to our people for subsistence and commerce was completely destroyed and forever lost as a result of the construction of the Bureau of Reclamation Owyhee Project Dam.³

Federal Enforcement Efforts Abandoned

In an effort to firm up a water supply for the Reservation, the Justice Department prepared a detailed case in the 1930's to adjudicate the Tribes' water rights in the Owyhee River based on the Winters Doctrine. The filing of such an adjudication was recommended in a number of comprehensive irrigation reports prepared for the Bureau of Indian Affairs, including a report completed by Charles Engle, an irrigation expert appointed by the Secretary of the Interior, who advised that the Tribes' water rights needed immediate protection.⁴ Although a comprehensive bill of complaint was prepared by the Justice Department, the case was never filed and was actively opposed by the Bureau of Reclamation.⁵ Ultimately, it took the recommendations of a special attorney appointed by the Secretary, Louis Crampton, who undertook yet another exhaustive report on irrigation at Duck Valley, to bring about the construction of Wild Horse Dam in the face of Reclamation's opposition. Yet the additional step of establishing and protecting the Tribes' water rights was never taken. JRP Report at VII-41-58.

The Tribes' water rights in Blue Creek and Mary's Creek have suffered a similar fate. Beginning at the turn of the century, non-Indian water users had constructed extensive diversion facilities on Blue Creek preventing flows from reaching the Reservation and causing several successful tribal farms to go out of business.⁶ Once again adjudication was recommended to no avail, even though it was recognized at the time that: "The longer this matter is deferred, the more numerous and difficult will be the questions relative to water supply, as water is being continually appropriated on all of these streams, both above and below the Reservation."⁷

³ It has been estimated that the average annual consumption of salmon and steelhead for each tribal member was 143 pounds. This amount does not take into consideration the Tribes' use of salmon and steelhead for trade and commerce.

⁴ JRP Report at VII-23-27.

⁵ JRP Report at VII-27-40, 59.

⁶ JRP Report at VI-1-14.

⁷ JRP Report at VI-13.

The Federal officials responsible for protecting the Tribes' water rights continually deferred taking action to establish Duck Valley water rights in favor of development by non-Indians above and below the Reservation, and in favor of the Bureau of Reclamation Owyhee Project. At every turn, the Tribes' water rights were continually sacrificed for the benefit of non-Indian water users.

Duck Valley Indian Irrigation Project, A Failed Promise

The Duck Valley Indian Irrigation Project, which was finally constructed in 1938 along with the Wild Horse Dam as its storage facility to deliver water to irrigate agricultural lands on the Reservation, was never completed, and its promise has remained unfulfilled. As constructed, the Duck Valley Indian Irrigation Project would only deliver water to 12,800 acres of reservation lands, not the full 24,000 acres of irrigable reservation lands that had been identified by a number of studies conducted by the Government. Thus, the Tribes' goal of maximizing the amount of irrigated agricultural lands has never been fully realized.

Over the years, the Federal Government has not provided sufficient funds to adequately maintain the Duck Valley Indian Irrigation Project, and the fees generated by the Project are insufficient to even nominally maintain it. Since the 1960's, the Duck Valley Indian Irrigation Project has been required to operate on an annual budget of \$60,000, the amount of the operation and maintenance fees charged to water users. As a result, the Duck Valley Indian Irrigation Project has fallen into a substantial state of disrepair. Of the 12,800 acres of Duck Valley Indian Irrigation Project lands, 7,000 acres are in sub-optimal production and the remaining 5,800 acres are currently fallow because of the deteriorating facilities and poor engineering. In addition to the reduced number of acres in production, those Duck Valley Indian Irrigation Project lands that remain under active irrigation suffer from lower yields and less income than similarly situated off-reservation farms due to less than optimal cropping patterns.

The subsidies that were promised to the Project have never materialized, and the level of disrepair has steadily increased. Some of the problems plaguing the Duck Valley Indian Irrigation Project include overgrown and silted irrigation ditches, non-functioning gates and turnouts, and poorly engineered and unlined irrigation ditches, resulting in a highly inefficient delivery system and steadily declining agricultural production. Based on our current estimates, it will cost over \$10.7 million to fully rehabilitate the Duck Valley Indian Irrigation Project to bring all 12,800 acres of agricultural lands into production.

Since approximately 2000, the Tribes have operated and maintained the Duck Valley Indian Irrigation Project under a Memorandum of Agreement and now as part of our Self-Governance Compact. Some improvement has occurred, but without significant funds to rehabilitate and substantially improve the Project, and to over operation costs, progress is minimal.

Settlement Negotiations

Madam Chairwoman, we have been engaged in negotiations with private water users, the State of Idaho, the State of Nevada, and the Federal government to settle our water rights claims for over 15 years. It should be noted that the parties conducted these negotiations consistent with the Department's policy for the settlement of claims concerning Indian water resources. Throughout this process, the Shoshone-Paiute Tribes and all of the other parties have anticipated a significant Federal contribution to our settlement. In fact, the Federal negotiating team reported to the Tribes that it would recommend a Federal contribution of \$44.9 million to settle the Tribes water rights claims. At the point where we had reached agreements with all parties to settle our claims, we learned that the Federal government, at the direction of the Office of Management and Budget, had abandoned their prior offer and reduced the Federal contribution to \$6 million. This development apparently signaled a much more narrow interpretation of Interior's settlement guidelines than had been applied in the past.

1. Federal Government's Position

At a hearing before the Senate Committee on Indian Affairs, the Department of the Interior took the position that it did not support the settlement because not only did it disagree with the cost, but there must be a substantial state contribution. Madam Chairwoman, our difficulty with the Department's position is that it seems to change depending on the settlement at hand. The policies and guidelines are applied neither consistently or with an even hand. The Department's abrupt shifts in position in our settlement have directly caused all of the parties in our settlement to re-examine their respective positions and consider their litigation alternatives as we detail below.

However, the cost of the settlement is consistent with the Federal Team's recommendation of \$44.9 million. It includes some additional amounts that take into account greater costs of rehabilitation of the Duck Valley Irrigation Project to which the Department ultimately agreed, and other project costs. Indeed, in the Tribes' view, we would have likely ended up at a settlement in the amount of \$60 million had the Department proceeded in the ordinary course in its negotiations with the Tribes.

Moreover, the Department's position on a state contribution had not been raised as an unsatisfied pre-requisite of settlement before its testimony. Even then, its position was taken without consideration of the fact that, at Duck Valley, the issues and responsibilities are almost entirely federal. Since the hearing in April of 2007, we have taken steps to quantify the significant monetary value of the State's contribution, which I will discuss briefly in a moment, and I am sure that the state's witness will amplify on this issue. But first, it is important for the Committee to know the negative effects of caused by the delay in reaching agreement on a Federal contribution.

First, the State of Idaho abandoned the Idaho portion of the settlement and made an offer of judgment to resolve the Tribes' water rights claims through a consent decree. There is no doubt that this development was the result of the ever shifting sands of the

Interior's policies and guidelines, particularly against the backdrop of the Nez Perce settlement that Idaho had just concluded. The Idaho consent decree was entered by the court on December 12, 2006, and decreed the Tribes' water rights in Idaho. Under the decree the Tribes' have approximately 19,516 acre-feet in the Owyhee River and its tributaries, including Blue Creek, based on the water necessary for domestic/commercial/municipal purposes, irrigation, reservoir storage, stock water and instream flow for stock and wildlife. The Tribes' claims for lake level maintenance, wildlife habitat and instream flows for fisheries were disallowed. The consent decree in Idaho did not resolve any of our water related claims against the Federal Government, however; nor did it provide the means to put any of the Tribes' water to use. Thus the need for the present federal settlement remains undiminished.

Madam Chairwoman, it is particularly disheartening to our people that after 15 long years of negotiations with representatives of the Federal government, including the Bureau of Reclamation, the Bureau of Indian Affairs and the Department of Justice, the results of those lengthy and difficult negotiations, including the original recommendation of a Federal contribution of \$44.9 million, can be delayed and even wiped out by certain Federal officials at the eleventh hour of the process. These Federal officials have never engaged in or participated in negotiations with our Tribe and have never set foot on our Reservation to see the challenges we must contend with each day.

Indeed, as a result of the intransigence of the Federal government in moving forward with a comprehensive settlement in a timely fashion, the Tribes had little choice but to accept the offer of judgment made by the State of Idaho involving the Tribes' water rights in Idaho. Time literally ran out in the face of the litigation schedule set by the Idaho courts, and in the face of the unwillingness of the Federal government to reconsider its proposed federal contribution of \$6 million.

2. The State of Nevada's Substantial Contribution

On a more positive note, our settlement agreement with the State of Nevada and private water users in Nevada provides the Tribes with 111,476 acre-feet of surface water from the Owyhee River, storage water in the Wild Horse Reservoir, all water flows originating from springs and creeks on the Reservation, and 2,606 acre-feet of ground water, plus perennial yield. At the same time, the agreement protects the use of water by irrigators upstream (south) of the Reservation. The agreement is premised on allowing the upstream irrigators to continue their flood irrigation in the same manner they historically have irrigated, without interference, provided that the overall acreage agreed upon by the parties is not exceeded. The agreement also provides a small amount of storage to the upstream water users.

Nonetheless, the federal government has continued to voice concerns about a perceived lack of monetary contribution by the State of Nevada in a settlement of federal liability. Accordingly, the parties have worked diligently since the Senate hearing to demonstrate the significant monetary value that the State has committed to as part of this settlement. For example, the State conservatively estimates that in FY 2008, the value of its

contributions to the settlement, including full-time employees, part-time employees, the potential costs of a settlement master, and administrative burden and expenses will be approximately \$108,114. In FY 2009, when costs stabilize, the contribution will equal approximately \$94,644. In addition, the Department completely ignores that the Nevada Agreement itself requires a state contribution. As discussed above, that contribution is in the form of funding for gages, services which the State has already begun providing, and the services of a water commissioner.

Moreover, the FY09 figure, which will undoubtedly be adjusted upward for inflation (but does not represent fringe benefits and other aspects of value to the employees dedicated to the settlement), represents a value that will be contributed annually in perpetuity. Thus, over the next 100 years, the State will be expected to contribute more than \$10 million dollars to the settlement. By any rational measure, such a contribution represents a significant monetary contribution to the settlement and ought to satisfy the government's concerns here.

3. Reconciliation of Technical Concerns

During the Senate hearing, the Department testified that it had certain unspecified technical concerns about the settlement legislation. Although the Department raised its concerns in the eleventh hour, we invited the Department to outline its technical concerns and we addressed most of them within a short period of time. In short, our view has been that a negotiated result serves everybody best, such that we made more hard choices because of the overriding importance of achieving the promise that this settlement holds for our people. While the Department will undoubtedly complain that the legislation does not give it all that it desires, no settlement in the history of Indian water rights has likely done so. However, the Department must acknowledge how far we have come in the spirit of compromise to address its concerns.

4. Protections for Water Users

The Nevada Agreement, together with the proposed bill approving it, fully protects water users in Nevada. Those water users will continue to irrigate the lands they have historically irrigated, subject only to an agreed upon acreage cap. In Idaho, affected water users agreed to the consent decree entered by the Idaho court. Other water users had an opportunity to object to the consent decree in the court process. In addition, in order to satisfy concerns about potential impacts to water users within the Bureau of Reclamation's Owyhee Project, which is located over 100 miles downstream from the Duck Valley Reservation, the Bureau of Reclamation completed a study early in the negotiation process in 1996, to determine the effects, if any, of increased water use by the Tribe on the Owyhee Project. That study, which was shared with the Owyhee Project water users, showed no significant impacts on Owyhee Project users from the Tribes' anticipated increased use under a settlement. In addition, under the bill that is now being considered by this Committee, as well as the bill marked up by the Senate, the Tribes are not authorized to market tribal water off the Reservation, ensuring that, except for consumptive uses on the Reservation, water will not be taken out of the Basin and will

continue to flow downstream for use by the Owyhee Project and other users. Furthermore, once the project is rehabilitated as proposed under the bill, the project will become more efficient and the Tribes will potentially use less water. Moreover, any expanded project will necessarily be more efficient.

Conclusion

The Nevada agreement, together with the Tribes' decreed rights in Idaho, fulfills a critical aspect of our overall goal of creating a fully sustainable homeland for our people. Yet, there is one major element that remains unresolved. We will not be able to realize a fully sustainable homeland for our people without a significant Federal contribution to our settlement. A significant Federal contribution is essential to enable the Tribes to fully utilize its water through the rehabilitation and construction of water delivery structures necessary to transport water from the Wild Horse Dam and Reservoir and from Blue Creek, to restore and protect Reservation fisheries and critical wildlife habitat throughout the Reservation, and for the construction of other essential water related projects.

The Tribes cannot help but view the government's recent change in position as eerily similar to its past failures to secure water necessary to make our reservation a permanent homeland. It bears repeating that the United States is directly responsible for failing to protect the Tribes' water rights in the face of non-Indian development, failing to properly operate and maintain the Duck Valley Irrigation Project, failing to properly site reservoirs and storage facilities in order to avoid waste of water resources, and failing to protect the Tribes' salmon fishery.

Madam Chairwoman, rather than continue to focus on the past, the Tribes are committed to securing a stable and productive future for our people. In this regard, we believe that a federal contribution of \$60 Million would reasonably support the return of a viable Reservation for our people. This amount is significantly less than the \$135 Million that is supported by our damages claims against the Federal government, which satisfies a key component of the Department's water rights settlement policy. Nevertheless, this amount would enable the Shoshone-Paiute Tribes to:

- Rehabilitate the Duck Valley Irrigation Project
- Develop a portion of Owyhee PIA lands
- Provide a delivery system from Blue Creek
- Develop a Stream Bank Maintenance Program
- Make Reservoir Repairs
- Develop a Wildlife Habitat Project
- Provide for a Municipal Water System
- Capitalize a DVIP O,M&R Trust Fund
- Provide an economic development fund
- Provide for Land Acquisition
- Develop a Water Management Plan & Code

We have participated in the Federal government's negotiation process. We have followed the Federal Water Settlement Guidelines. And, after listening to the government's concerns expressed at the Senate hearing, we have taken steps to demonstrate the significant value being added to the settlement by the State of Nevada.

It is respectfully submitted that it is time for the United States of America to fulfill the promises of a generation past by providing a Federal contribution of \$60 Million to settle the water rights claims of the Shoshone-Paiute people and to fulfill the vision of our forefathers: the creation of a sustainable homeland for the Shoshone-Paiute people. H.R. 5293 is a just and fair bill that would help us to realize our vision upon passage.

Thank you.